

CODIFY GARDNER

It is no wonder that the veterans shout and curse. It is also not surprising that many of them no longer feel attached to this country as their home. They have not forsaken us; they feel that we have forsaken them. I want to add my voice to their shouts and curses.

— Daniel K. Inouye¹

INTRODUCTION

The *Gardner* presumption, also known as the pro-veteran canon, is a substantive canon of interpretation named after the Supreme Court case *Brown v. Gardner*.² The canon instructs courts to construe ambiguous statutes concerning veterans' benefits in favor of the veteran.³ While the canon today rarely acts as a tiebreaker,⁴ it has historically represented a strong congressional intent to care for veterans. Even in cases where the *Gardner* presumption is not outcome determinative, it acts as a powerful guiding principle for judges interpreting veterans' benefits statutes.⁵ Yet recent cases from the Supreme Court⁶ suggest that the canon in its current form may be at risk.

To establish the practical importance of *Gardner*, this Note begins by describing the challenges veterans face in receiving benefits from the Department of Veterans Affairs (VA). It next describes the history of the *Gardner* presumption, tracing it from the Revolutionary War era through the present day, demonstrating the canon's vitality from the earliest days of the nation through the end of the twentieth century. The Note then describes the current, vulnerable state of the canon based on the opinions in *Rudisill v. McDonough*⁷ and *Bufkin v. Collins*⁸ and analyzes the canon's minimal usage at the Federal Circuit over the past ten years. Finally, it argues that Congress can and should codify this canon to ensure its intent to benefit veterans is honored by courts and its coequal role is asserted in the federal system.

¹ Senator Daniel K. Inouye, Speech at Commencement Exercises for Hilo High School 3 (June 3, 1974) (transcript available in the Hamilton Library at the University of Hawai'i at Manoa), <https://evols.library.manoa.hawaii.edu/server/api/core/bitstreams/baf2036b-1dcd-4461-85d8-fb3b9f03d7df/content> [https://perma.cc/CS35-VCE3].

² 513 U.S. 115 (1994).

³ *Id.* at 118 (“[T]he rule [is] that interpretive doubt is to be resolved in the veteran’s favor.” (citing *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 220 n.9 (1991))).

⁴ See Appendix, HARV. L. REV., <https://harvardlawreview.org/print/vol-138/appendix-for-codify-gardner> [https://perma.cc/W7HV-CXQ4].

⁵ See *infra* section II.C, pp. 2100–02.

⁶ See generally *Rudisill v. McDonough*, 144 S. Ct. 945 (2024); *Bufkin v. Collins*, 145 S. Ct. 728 (2025).

⁷ 144 S. Ct. 945 (2024).

⁸ 145 S. Ct. 728 (2025).

I. THE VA AND ACCESS TO JUSTICE

The VA occupies a curious place in the landscape of federal administrative agencies. On one hand, it is one of the only agencies with a pro-claimant “duty to assist” benefits applicants,⁹ with statutes that govern what is envisioned to be a nonadversarial, collaborative process.¹⁰ On the other hand, the agency receives considerable criticism for falling short of this ideal.¹¹ *Gardner’s* presumption is an important tool to protect veterans in this strange administrative landscape in which veterans’ claims historically had been barred from judicial review, and where access to justice today continues to be a struggle.

From 1921, when Congress created a key predecessor to the modern VA,¹² to 1988, when Congress passed the Veterans’ Judicial Review Act,¹³ veterans dissatisfied with VA adjudications had no access to independent judicial review.¹⁴ The final stop for appeals was the Board of Veterans’ Appeals, which has always answered to the Secretary of the VA.¹⁵ Even the Administrative Procedure Act,¹⁶ which broadly provides for judicial review of final agency action, originally did not include the VA in its ambit.¹⁷ No other federal benefits agency had been so secluded from judicial review.¹⁸ In fact, the Supreme Court and the U.S. House of Representatives have referred to this period as one of “splendid isolation.”¹⁹ Congress eventually established judicial review over VA adjudications to address the agency’s arbitrary decisionmaking, account for the breakdown of the nonadversarial system, and ensure that veterans have similar due process rights to those of other beneficiaries.²⁰

Yet despite the introduction of judicial review, access to justice challenges continue to impede the courts’ independent review of VA

⁹ 38 U.S.C. § 5103A(e).

¹⁰ See, e.g., *id.* See generally Daniel Brook et al., *Federal Jurisprudence Regarding VA’s Duty to Provide a Medical Examination: Preserving the Uniquely Pro-Claimant Nature of VA’s Adjudicatory System While Providing Timely Decisions*, 1 VETERANS L. REV. 69 (2009) (describing this process in more detail).

¹¹ See *infra* notes 31–32 and accompanying text.

¹² Act of Aug. 9, 1921, Pub. L. No. 67-47, tit. I, § 1, 42 Stat. 147, 147.

¹³ Pub. L. No. 100-687, 102 Stat. 4105 (1988).

¹⁴ Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 U. KAN. L. REV. 513, 516 (2019).

¹⁵ *Id.* (citing 38 U.S.C. § 7101(a)).

¹⁶ Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

¹⁷ Act of Aug. 12, 1970, Pub. L. No. 91-376, § 8(a), 84 Stat. 787, 790; see also Simcox, *supra* note 14, at 516 n.15.

¹⁸ Simcox, *supra* note 14, at 516.

¹⁹ *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (quoting H.R. REP. NO. 100-963, pt. 1, at 10 (1988)).

²⁰ Simcox, *supra* note 14, at 520–21.

decisionmaking, with real-world consequences.²¹ A veteran dissatisfied with a determination must first appeal to either a higher-level official in their regional office or to the Board of Veterans' Appeals — with both offices being VA institutions whose target processing time for a hearing is 730 days.²² Veterans are generally not entitled to free legal representation throughout this civil appeals process.²³ Some secure private attorneys on contingent fee schemes in which varying percentages of veterans' back pay are taken as compensation.²⁴ Contingent fee rates before the VA are effectively capped at 33.33%, and 20% or less is considered presumptively reasonable.²⁵ Some of the 1.5 million veterans living in poverty²⁶ are able to secure representation through legal aid organizations,²⁷ but the rest who cannot secure a private attorney fall into the estimated 92% of low-income Americans who face their civil legal issues without adequate representation.²⁸

This historical lack of access to judicial review is perhaps one reason that the VA continues to fail in its duty to care for veterans. In 2023, there were an estimated 15.8 million veterans in the United States, constituting about 6% of the country's civilian adult population,²⁹ with

²¹ While this Note focuses on administrative decisions determining access to care in the first instance, veterans face equally daunting structural hurdles to suits involving medical malpractice and substandard care even after gaining access to the VA health system. For more on this topic, see generally Taylor C. Spillers, *Fighting the FTCA: Medical Malpractice, Veterans, and the VA*, 74 ARK. L. REV. 333 (2021).

²² BD. OF VETERANS' APPEALS, U.S. DEP'T OF VETERANS AFFS., ANNUAL REPORT FISCAL YEAR (FY) 2024, at 10, https://department.va.gov/board-of-veterans-appeals/wp-content/uploads/sites/19/2025/04/2024_bva2024ar.pdf [<https://perma.cc/ZFM8-6T9T>]. The actual average wait time for a Board hearing in 2024 was 750 days. *More Board Personnel Address Pending AMA Appeals & Wait Times*, BD. OF VETERANS' APPEALS (Feb. 6, 2025), <https://www.bva.va.gov/more-board-personnel-address-pending-ama-appeals-wait-times.asp> [<https://perma.cc/85WB-P5AE>].

²³ See 38 C.F.R. § 14.636(c) (2008).

²⁴ See *id.* § 14.636(f). If a veteran is successful on appeal, the VA will typically pay a lump sum of the total monthly disability payments calculated from the day on which they filed a claim. *Id.* § 14.636(i). As the wait times to be heard are so long, these lump sums can reach tens or (in rare cases) hundreds of thousands of dollars. See James Dao, *For a Veteran, Disability Payment Is Long in Coming*, N.Y. TIMES (Jan. 25, 2012), <https://www.nytimes.com/2012/01/26/us/veteran-denied-disability-to-be-repaid-after-60-years.html> [<https://perma.cc/J8FM-LJ9M>] (describing a \$400,000 back pay award for a World War II veteran).

²⁵ 38 CFR § 14.636(f). Fees above 33.33% are presumptively unreasonable. *Id.*

²⁶ Tamara Dubowitz, *Food Insecurity Among Veterans*, RAND CORP. (July 21, 2021), <https://www.rand.org/pubs/perspectives/PEA1363-2.html> [<https://perma.cc/HD7N-FCB8>].

²⁷ See, e.g., *Veterans Law & Disability Benefits Clinic*, WILMERHALE LEGAL SERVS. CTR. OF HARV. L. SCH., <https://legalservicescenter.org/students-clinics/veterans-legal-clinic> [<https://perma.cc/6CL6-6PJB>]; *Lawyers Serving Warriors® (LSW) Program*, NAT'L VETERANS LEGAL SERVS. PROGRAM, <https://www.nvlsp.org/what-we-do/lawyers-serving-warriors> [<https://perma.cc/64ST-7272>].

²⁸ *The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans*, LEGAL SERVS. CORP. (2022), <https://justicegap.lsc.gov> [<https://perma.cc/SZB3-XXDJ>].

²⁹ Press Release, U.S. Census Bureau, *Veteran's Day 2024: November 11* (Oct. 16, 2024), <https://www.census.gov/newsroom/facts-for-features/2024/veterans-day.html> [<https://perma.cc/88KA-29N4>].

about nine million enrolled to receive VA health care.³⁰ Despite over \$407 billion appropriated to the VA by Congress in fiscal year 2025 alone,³¹ complaints about the VA's handling of veterans' mental and physical health abound.³² Black veterans approve of the VA at the lowest rate of any racial group and are 14% less likely to be approved for disability compensation than white veterans.³³ Only 44% of female veterans are enrolled in VA health care, compared to 62% of all veterans.³⁴ And despite rhetoric from both sides of the aisle on the importance of caring for veterans,³⁵ the veteran suicide rate remains 72% higher than that of the civilian population.³⁶

The small number of suits with counsel that proceed past internal VA appeals to Article III independent judicial review are thus already the result of long-awaited and hard-fought legal odysseys.

³⁰ *Veterans Health Administration: About VHA*, U.S. DEP'T OF VETERANS AFFS. (Jan. 20, 2025), <https://www.va.gov/health/aboutvha.asp> [<https://perma.cc/J435-66Y5>].

³¹ *Agency Profile: Department of Veterans Affairs (VA)*, USASPENDING.GOV (Feb. 27, 2025), <https://www.usaspending.gov/agency/departments-of-veterans-affairs> [<https://perma.cc/GX6A-A7RV>].

³² See, e.g., Kathleen McGrory & Neil Bedi, *How the VA Fails Veterans on Mental Health*, PROPUBLICA (Jan. 9, 2024, 5:00 AM), <https://www.propublica.org/article/how-veterans-affairs-fails-mental-health-patients> [<https://perma.cc/2ZL9-GJPC>]; Theresa Vargas, *He Tried to Get His Disabled Veteran Son Help. Now, He's Burying Him*, WASH. POST (Dec. 20, 2023), <https://www.washingtonpost.com/dc-md-va/2023/12/20/timothy-robinson-veteran-died-benefits/> [<https://perma.cc/62MY-6Z2E>] (describing the story of Timothy Robinson, a homeless veteran who, after being denied VA benefits, appealed to the Board of Veteran's Appeals and died while awaiting VA assistance that was ordered on remand but never materialized); Rachael Riley, *Mother Blames VA in Navy Vet's Death: "Look at What They've Done,"* MILITARYTIMES (June 10, 2024), <https://www.militarytimes.com/veterans/2024/06/10/mother-blames-va-in-navy-vets-death-look-at-what-theyve-done> [<https://perma.cc/Q5S8-8QCR>] (discussing the death of a veteran seeking mental health care who waited over five months for an appointment).

³³ U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-106097, VA DISABILITY BENEFITS: ACTIONS NEEDED TO FURTHER EXAMINE RACIAL AND ETHNIC DISPARITIES IN COMPENSATION 16-17 (2023).

³⁴ *VA Health Care Utilization by Recent Veterans*, U.S. DEP'T OF VETERANS AFFS., <https://www.publichealth.va.gov/epidemiology/reports/oefoifond/health-care-utilization> [<https://perma.cc/79NN-PV2F>]; see also Mariel Padilla, *Women and LGBTQ+ Veterans Say VA Facilities "Weren't Built with Us in Mind,"* THE 19TH (Aug. 7, 2023, 6:00 AM), <https://19thnews.org/2023/08/va-hospitals-women-lgbtq-veterans> [<https://perma.cc/G94X-ZEG6>].

³⁵ Proclamation No. 10855, 86 Fed. Reg. 88871 (Nov. 12, 2024) ("As a Nation, we have one truly sacred obligation: to prepare and equip those we send into harm's way and to care for them and their families when they return home."); *Speech: Donald Trump Holds a Political Rally in Claremont, New Hampshire—November 11, 2023*, ROLL CALL, <https://rollcall.com/factbase/trump/transcript/donald-trump-speech-political-rally-claremont-new-hampshire-november-11-2023> [<https://perma.cc/UTT6-QUZ2>] ("We love our veterans. We got to take care of our veterans here. They're among our greatest people. . . . I will put veterans first and America first every single time.").

³⁶ MICHELE L. MALLOY & JARED S. SUSSMAN, CONG. RSCH. SERV., IF11886, VETERAN SUICIDE PREVENTION 1 (2024).

II. GARDNER AND THE HISTORY OF THE PRO-VETERAN CANON

A. Fred P. Gardner

Fred P. Gardner enlisted in the United States Armed Forces and served on active duty from April 1953 to January 1955,³⁷ deploying to fight in the Korean War.³⁸ When he returned, he received health care from the VA.³⁹ Mr. Gardner underwent surgery at a VA facility in 1986 to remove a herniated disk.⁴⁰ During the surgery, he sustained a new injury that he claimed resulted in “progressive nerve damage and muscular wasting in the left leg,” as well as “complete[] disab[ility].”⁴¹ By the time his case reached the Supreme Court, “Mr. Gardner w[ore] a leg brace, use[d] a cane, require[d] a wheelchair for hospital visits, and [wa]s disabled from employment.”⁴²

Mr. Gardner filed a claim with the VA for additional compensation based on the problematic surgery.⁴³ Under a statute mandating additional compensation for injuries related to VA-provided medical care, Mr. Gardner argued that his new injuries qualified him for additional disability compensation.⁴⁴ The VA Regional Office in Waco, Texas, denied his claim⁴⁵ under a regulation promulgated by the VA.⁴⁶ The regulation stated that an injury claimed under the statute is compensable only when the injury “proximately resulted [from] carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault on the part of the [VA],” or from “an ‘accident,’” defined in the regulation as “an unforeseen, untoward event.”⁴⁷ This fault requirement on the part of the VA, articulated in the regulation but not in the statute, constituted the primary issue on appeal.

The Supreme Court ruled unanimously in favor of Mr. Gardner.⁴⁸ Justice Souter explained that the plain text of the statute did not permit the agency to require accident or fault.⁴⁹ The Court rejected the VA’s argument that the word “injury” in the statute implied a fault requirement, or at least was ambiguous as to fault and thus should have been read in favor of the agency under *Chevron U.S.A. Inc. v. Natural*

³⁷ Brief for Petitioner at 7, *Brown v. Gardner*, 513 U.S. 115 (1994) (No. 93-1128), 1994 WL 233282, at *7.

³⁸ *Gardner*, 513 U.S. at 116.

³⁹ *Id.*

⁴⁰ Brief for Petitioner, *supra* note 37, at 7.

⁴¹ Brief for Respondent at 1, *Gardner*, 513 U.S. 115 (No. 93-1128), 1994 WL 381835, at *1.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* (quoting 38 U.S.C. § 1151 (Supp. V 1988)).

⁴⁵ Brief for Respondent, *supra* note 41, at 2.

⁴⁶ *Id.*; 38 C.F.R. § 3.358(c)(3) (1990).

⁴⁷ 38 C.F.R. § 3.358(c)(3).

⁴⁸ *Gardner*, 513 U.S. at 115.

⁴⁹ *Id.* at 117.

*Resources Defense Council, Inc.*⁵⁰ The Court found that even if the word “injury” were ambiguous, it would not be resolved in favor of a fault requirement because of “the rule that interpretive doubt is to be resolved in” favor of the veteran.⁵¹ This short parenthetical constitutes the basis of the pro-veteran canon as commonly cited today.⁵²

In addition to providing the modern basis for the pro-veteran presumption, Mr. Gardner’s case highlights the importance of judicial review over the VA. Without independent judicial review of VA practices in this instance, Mr. Gardner would not have been compensated for his injuries suffered at the hands of VA surgeons.

B. *The Pre-Gardner History of the Pro-Veteran Canon*

The Court did not create deference to veterans out of thin air in 1994. While the veterans legal community now refers to the pro-veteran canon as the *Gardner* presumption, this naming implies a false recency.⁵³ Congressional intent to care for veterans has been evident since before the Founding.⁵⁴ This intent is seen in both pro-veteran legislation and the Court’s longstanding recognition of this intent.

For example, the Court held the Invalid Pensions Act of 1792⁵⁵ to be unconstitutional in *Hayburn’s Case*,⁵⁶ decided in that same year.⁵⁷ The legislation, a legacy of past enactments by Congress and tireless advocacy by George Washington on behalf of the troops he had led in the Revolutionary War,⁵⁸ had forced judges already riding circuit to adjudge individual veterans’ claims.⁵⁹ In considering the case, Justice Iredell and District Judge Sitgreaves acknowledged the importance of respecting congressional purpose toward veterans, emphasizing “[t]he high respect we entertain for the Legislature, our feelings as men for persons . . . and our sincere desire to promote, whether officially or otherwise, the just and benevolent views of Congress, so conspicuous on the present . . . occasion[.]”⁶⁰ Judge Greenberg, who currently sits on the Court of Appeals for Veterans Claims, has stated that the case represents

⁵⁰ 467 U.S. 837 (1984); *Gardner*, 513 U.S. at 117–18.

⁵¹ See *Gardner*, 513 U.S. at 117–18 (citing *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 220 n.9 (1991)).

⁵² *Id.*

⁵³ See, e.g., *Rudisill v. McDonough*, 144 S. Ct. 945, 959 (2024) (Kavanaugh, J., concurring) (“The first glimmerings of the veterans canon appeared in the 1940s.” (citing *Boone v. Lightner*, 319 U.S. 561, 575 (1943))).

⁵⁴ See Eric Hughes, *Before Boone v. Lightner: The Lost History of the Pro-Veteran Canon*, 42 MISS. COLL. L. REV. 4, 11 (2024) (describing a Continental Congress resolution to provide for disabled veterans in 1776).

⁵⁵ Act of Mar. 23, 1792, ch. 11, 1 Stat. 243.

⁵⁶ 2 U.S. (2 Dall.) 409, 411 (1792).

⁵⁷ *Id.*

⁵⁸ STACEY-RAE SIMCOX & DAVID E. BOELZNER, *VETERANS BENEFITS* 10 (2023).

⁵⁹ Maeva Marcus & Robert Teir, *Hayburn’s Case: A Misinterpretation of Precedent*, 1988 WIS. L. REV. 527, 529.

⁶⁰ *Hayburn’s Case*, 2 U.S. (2 Dall.) at 413.

early evidence of a court recognizing “benevolent congressional intent”⁶¹ to veterans. Following *Hayburn’s Case*, Congress passed new pension laws for veterans disabled from the Revolutionary War in 1806,⁶² 1818,⁶³ and 1823⁶⁴ that removed the unconstitutional design fatal to the 1792 legislation.⁶⁵

The sustained legislative response to *Hayburn’s Case* demonstrates how veterans historically utilized the political process rather than the courts to secure benefits. Throughout the nineteenth century, courts considered these statutes unambiguous and thus had little occasion to apply any interpretive canons.⁶⁶ However, early “glimmerings”⁶⁷ of a presumption in favor of veterans can be seen in lower court cases⁶⁸ and authorities⁶⁹ of the time.

The sweeping Soldiers’ and Sailors’ Civil Relief Act of 1918⁷⁰ following World War I, and the repassage of that Act in 1940 during World War II,⁷¹ led to the administrative complexity that resulted in more litigation related to veterans issues and thus a more active application of

⁶¹ RORY RILEY-TOPPING & DIANE BOYD RAUBER, JUSTICE AND THE AMERICAN VETERAN: A HISTORY OF THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS 5 (2021).

⁶² Act of Apr. 10, 1806, ch. 25, 1 Stat. 376, 376, 378 (superseding all previous laws relating to pensions for soldiers disabled by wounds sustained during the Revolutionary War and expanding the scope of the legislation passed on March 23, 1792, to benefit disabled veterans who served in State troops and militia units as well as disabled Continental Line veterans). *See generally* WILLIAM HENRY GLASSON, HISTORY OF MILITARY PENSION LEGISLATION IN THE UNITED STATES (Fac. of Pol. Sci. of Columbia Univ. ed., AMS Press 1968) (1900) (describing such history from the Revolutionary War to the late nineteenth century).

⁶³ Act of Mar. 18, 1818, ch. 19, 3 Stat. 410 (providing lifetime pensions to poverty-stricken Continental Army and U.S. Navy veterans).

⁶⁴ Act of Mar. 1, 1823, ch. 59, 3 Stat. 782 (restoring pensions to veterans who were removed from the rolls by the Secretary of War).

⁶⁵ Compare the language in the 1792 Act requiring courts to transmit “opinion[s]” for review by the Secretary of War, Act of Mar. 23, 1792, ch. 11, §§ 2, 4, 1 Stat. 243, 244, with the language in the subsequent acts, requiring either the transmittal only of judicially gathered “testimony,” Act of Mar. 18, 1818, § 2, 3 Stat. at 410, “evidence,” and other factual records, Act of Apr. 10, 1806, § 2, 1 Stat. at 377, or no transmittal at all, Act of Mar. 1, 1823, § 2, 3 Stat. at 782.

⁶⁶ *See, e.g.*, *Rutherford v. Greene’s Heirs*, 15 U.S. (2 Wheat.) 196, 197 (1817) (finding no ambiguity in a veterans benefits statute and no reason to apply the canon); *United States v. Bowen*, 100 U.S. 508, 513–14 (1879) (same).

⁶⁷ *Rudisill v. McDonough*, 144 S. Ct. 945, 959 (2024) (Kavanaugh, J., concurring).

⁶⁸ *See, e.g.*, *Lowe v. Moore*, 6 S.C. Eq. (1 McCord Eq.) 243, 247 (1826) (“The object of the act was, to provide for a class of men, who had once rendered essential services to their country, and who are now unable to assist themselves.”).

⁶⁹ HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 506–07 (2d ed. 1911) (“Where the object of an act of Congress . . . is to confer a bounty or reward, in consideration of meritorious services rendered to the state, . . . any doubts or ambiguities arising upon its terms should be resolved in favor of the intended beneficiaries. Thus, a statute which grants pensions or half pay to retired, disabled, or superannuated military officers should be interpreted in the manner most beneficial to the officers” (footnote omitted)).

⁷⁰ Act of Mar. 8, 1918, ch. 20, 40 Stat. 440.

⁷¹ Soldiers’ and Sailors’ Civil Relief Act of 1940, ch. 888, 54 Stat. 1178 (codified at 50 U.S.C. ch. 50).

the pro-veteran presumption.⁷² The creation of the VA in 1930 also unified veteran-related issues into a single agency whose actions veterans could challenge.⁷³ As the VA grew in the late twentieth century, so did the Court's recognition of this growth: "The solicitude of Congress for veterans is of long standing. Veterans' pensions, homes, hospitals and other facilities have been supplied on an ever-increasing scale. Many veterans . . . have had to depend upon these benefits for long periods of their lives."⁷⁴

It was in this era of burgeoning veterans law that the direct origin of *Gardner's* presumption can be found in case law. In 1943, the Supreme Court stated in *Boone v. Lightner*⁷⁵ that "[t]he Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."⁷⁶ When deciding a question under the Selective Training and Service Act of 1940⁷⁷ in *Fishgold v. Sullivan Drydock & Repair Corp.*,⁷⁸ the Court cited *Boone* in writing that "[t]his legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."⁷⁹ The Court then cited *Fishgold* in 1991, writing: "[W]e would ultimately read the provision in [the veteran's] favor under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."⁸⁰ This footnote is ultimately what the Court cited in *Gardner* for the proposition that is recognized as *Gardner's* presumption today.⁸¹

Thus, while the presumption may at first glance seem like a recent development, courts have recognized Congress's special "solicitude" for veterans for over a century. *Hayburn's Case* provides evidence of this solicitude dating back to the earliest days of our republic.

C. The Last Decade of Gardner

Despite *Gardner's* long historical pedigree, its decline can be seen in both the Federal Circuit and the Supreme Court. The Federal Circuit is the only Article III court that hears appeals from the Court of Appeals

⁷² For example, *Boone v. Lightner*, 319 U.S. 561 (1943), a case that directly traces to *Gardner*, concerned the interpretation of the 1940 Act just three years after the Act's passage. See *infra* notes 75–81 and accompanying text.

⁷³ *About the Department*, U.S. DEP'T OF VETERANS AFFS. (Apr. 9, 2025), <https://department.va.gov/about> [<https://perma.cc/7QZH-F5UA>].

⁷⁴ *United States v. Oregon*, 366 U.S. 643, 647 (1961) (footnote omitted).

⁷⁵ 319 U.S. 561 (1943).

⁷⁶ *Id.* at 575.

⁷⁷ Pub. L. No. 76-783, 54 Stat. 885.

⁷⁸ 328 U.S. 280 (1946).

⁷⁹ *Id.* at 285 (citing *Boone*, 319 U.S. at 575).

⁸⁰ *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991) (citing *Fishgold*, 328 U.S. at 285).

⁸¹ *Brown v. Gardner*, 513 U.S. 115, 117–18 (1994) (citing *King*, 502 U.S. at 220 n.9).

for Veterans Claims (an Article I court).⁸² Accordingly, the Federal Circuit is the appellate court most likely to hear disputes involving veterans' benefits statutes.⁸³ In the ten-year period from 2013–2023, the Federal Circuit cited *Gardner* in the veterans law context thirty times but utilized *Gardner* to rule in favor of a veteran only twice.⁸⁴ A study of cases from 2011–2016, the methodology of which was replicated for this Note, found that the Federal Circuit used *Gardner* to rule in favor of a veteran exactly zero times.⁸⁵ Rather, the canon was most commonly employed in dissent when courts found against veteran claimants, or in passing, but not as determinative.⁸⁶

Competing doctrines of deference may have frustrated the congressional intent underpinning *Gardner*'s presumption. Deference under both *Chevron* and *Auer v. Robbins*⁸⁷ required courts to rule in favor of the agency — in this case the VA — on questions of statutory and regulatory interpretation, respectively.⁸⁸ In contrast, *Gardner* required courts to rule against agency interpretations that denied benefits to veterans. This tension was, until the recent overturning of *Chevron*,⁸⁹ alive in the scholarship,⁹⁰ but the Supreme Court had declined to address the issue⁹¹ while the Federal Circuit held that *Gardner* was subordinate to *Chevron*.⁹²

Although the Federal Circuit does not often use *Gardner* to rule in favor of veterans, its deployment of the presumption in concurrences and dissents provides an important moral grounding to the court's

⁸² See *Court Jurisdiction*, U.S. CT. OF APPEALS FOR THE FED. CIR., <https://www.ca9c.uscourts.gov/home/the-court/about-the-court/court-jurisdiction> [<https://perma.cc/QGD7-TMDV>].

⁸³ While the Supreme Court is the most important court for questions of statutory interpretation writ large, it has cited *Gardner* in the veterans law context only twice in the last decade, in *Rudisill v. McDonough*, 144 S. Ct. 945, 959 (2024) (Kavanaugh, J., concurring) (citing *Gardner*, 513 U.S. at 118), and *Bufkin v. Collins*, No. 23-713, slip op. at 15 (Mar. 5, 2025) (citing *Gardner*, 513 U.S. at 118), and as such was not worth including in the quantitative analysis presented in this Note.

⁸⁴ See Appendix, *supra* note 4.

⁸⁵ See Carolyn Ryan, *The Common Law Solution to Gardner's Presumption*, 8 VETERANS L. REV. 24, 36 (2016).

⁸⁶ See Appendix, *supra* note 4.

⁸⁷ 519 U.S. 452 (1997).

⁸⁸ See Thomas E. Nielsen & Krista A. Stapleford, *What Loper Bright Might Portend for Auer Deference*, HARV. L. REV. BLOG (July 5, 2024), <https://harvardlawreview.org/blog/2024/07/what-loper-bright-might-portend-for-auer-deference> [<https://perma.cc/MCC4-RLAS>].

⁸⁹ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

⁹⁰ See, e.g., Chadwick J. Harper, Note, *Give Veterans the Benefit of the Doubt: Chevron, Auer, and the Veteran's Canon*, 42 HARV. J.L. & PUB. POL'Y 931, 932 (2019); Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling Brown v. Gardner's Presumption that Interpretive Doubt Be Resolved in Veterans' Favor with Chevron*, 61 AM. U. L. REV. 59, 61 (2011).

⁹¹ See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408–09 (2019), in which the Supreme Court upheld *Auer* deference in a VA context without addressing *Gardner*'s presumption.

⁹² *Nat'l Org. of Veterans Advocs., Inc. v. Sec'y of Veterans Affs.*, 809 F.3d 1359, 1363 (Fed. Cir. 2016) ("There is no force to [the petitioner's] suggestion that the DVA's interpretations are not entitled to *Chevron* deference because of *Gardner*.").

decisionmaking. For example, Judge Reyna in 2021 dissented from the majority, writing:

While we have held that the pro-veteran canon applies only to ambiguous statutes and cannot override plain text, that rule does not render the canon a tool of last resort, subordinate to all others. To the contrary, we have stated that the canon applies whenever the plain text does not expressly exclude the veteran's interpretation.⁹³

When *Gardner* is used, its application effectuates congressional purpose. In one case, the Federal Circuit ordered compensation for a veteran's partial knee replacement, rejecting the VA's interpretation that the regulation at issue covered only *full* replacements.⁹⁴ Congress likely did not consider the difference between partial and full knee replacements when drafting the statute⁹⁵ that delegated authority to the VA to issue the regulation⁹⁶ in this case. But that statute has, in various amendments, articulated Congress's purpose over the years to "make . . . improvements"⁹⁷ and "increase the rates of compensation for disabled veterans."⁹⁸ Though the Federal Circuit has rarely applied *Gardner* in the last decade, those few applications have furthered Congress's express goal to support veterans.

D. The Gardner Presumption in the Supreme Court

The Supreme Court's most recent veterans cases also highlighted the decline of *Gardner*'s presumption and the necessity of codification.

The 2024 case *Rudisill v. McDonough* revealed some Justices' desire to eliminate the presumption.⁹⁹ Justice Jackson, on behalf of the Court, overruled the Federal Circuit and found in favor of the veteran's interpretation of two education benefit statutes.¹⁰⁰ James Rudisill served for eight years in the United States Army and attempted to use his Montgomery GI Bill¹⁰¹ and Post-9/11 GI Bill¹⁰² benefits.¹⁰³ The VA read a

⁹³ *Kisor v. McDonough*, 995 F.3d 1316, 1336–37 (Fed. Cir. 2021) (Reyna, J., dissenting) (footnote omitted) (citations omitted) (citing *Sursely v. Peake*, 551 F.3d 1351, 1357 (Fed. Cir. 2009); *Hudgens v. McDonald*, 823 F.3d 630, 637 (Fed. Cir. 2016)).

⁹⁴ *Hudgens*, 823 F.3d at 637.

⁹⁵ 38 U.S.C. § 1155.

⁹⁶ 38 C.F.R. § 4.71a.

⁹⁷ Veterans' Benefits Programs Improvement Act of 1991, Pub. L. No. 102-86, 105 Stat. 414, 414 (amending 38 U.S.C.).

⁹⁸ Veterans' Compensation and Program Improvements Amendments of 1984, Pub. L. No. 98-223, 98 Stat. 37, 37 (amending 38 U.S.C.).

⁹⁹ See *Rudisill v. McDonough*, 144 S. Ct. 945, 959, 961 (2024) (Kavanaugh, J., concurring).

¹⁰⁰ *Id.* at 950, 959 (majority opinion).

¹⁰¹ Montgomery GI Bill Act of 1984, Pub. L. No. 98-525, tit. VII, 98 Stat. 2553 (codified as amended in scattered sections of 10 and 38 U.S.C.). While this provision is now referred to as the Montgomery GI Bill, it was passed as the Veterans' Educational Assistance Act of 1984. *Id.* § 701, 98 Stat. at 2553.

¹⁰² Post-9/11 Veterans Educational Assistance Act of 2008, Pub. L. No. 110-252, tit. V, 122 Stat. 2357 (codified as amended in scattered sections of 10 and 38 U.S.C.).

¹⁰³ *Rudisill*, 144 S. Ct. at 949.

provision in the Post-9/11 GI Bill to require Rudisill to forfeit months of eligibility to switch from using Montgomery benefits to Post-9/11 benefits.¹⁰⁴ The Court determined the statute was unambiguous, and that the plain text and structure of the relevant statutes were properly read as not forcing a veteran to forfeit months of eligibility.¹⁰⁵ Justice Jackson wrote that “[i]f the statute were ambiguous, the pro-veteran canon would favor Rudisill, but the statute is clear, so we resolve this case based on statutory text alone.”¹⁰⁶

Justice Kavanaugh, though concurring, disagreed with Justice Jackson’s dicta reference to the pro-veteran canon.¹⁰⁷ Joined by Justice Barrett, he decried the canon as being constructed “almost by accident” as purposivist analysis in the 1940s transformed into “reflexive repetition” by the Court of a canon neither rooted in the Constitution nor in line with the Spending Clause.¹⁰⁸

Justice Thomas, in a dissent joined by Justice Alito, “share[d] Justice Kavanaugh’s concern that the . . . canon . . . ‘developed almost by accident’” and “question[ed] whether this purported canon should ever have a role in our interpretation.”¹⁰⁹ He cited to an earlier concurrence of his in which he voiced similar concerns about the Court’s employment of the Indian “trust relationship” canon.¹¹⁰ He argued that the Indian trust relationship “seems to lack a historical or constitutional basis”¹¹¹ and that some previous invocations of the canon were “mere dicta.”¹¹² Justice Thomas’s comparison of *Gardner* to the waning Indian trust canon also indicated that centuries-old case law did not constitute a “[certain foundation[]” from which to employ the canon.¹¹³

Potentially building on the doubts expressed in the noncontrolling opinions in *Rudisill*, the Court declined to employ *Gardner* in *Bufkin v. Collins*.¹¹⁴ The 7–2 majority interpreted a statute to permit the Court

¹⁰⁴ *Id.* at 958.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 959 (Kavanaugh, J., concurring).

¹⁰⁸ *Id.* at 959–60 (citing U.S. CONST. art. I, § 7, cl. 2; § 8, cl. 1; § 9, cl. 7).

¹⁰⁹ *Id.* at 967 (Thomas, J., dissenting) (quoting *id.* at 959 (Kavanaugh, J., concurring)).

¹¹⁰ *Id.* (citing *Arizona v. Navajo Nation*, 143 S. Ct. 1804, 1816 (2023) (Thomas, J., concurring)). This canon dictates that courts interpret treaties with “the conception that the federal government holds lands on behalf of the tribes and must manage these lands for the tribes’ benefit.” Max Minzner, Case Notes, *Construction Work: The Canons of Indian Law*, 107 YALE L.J. 863, 864 (1997).

¹¹¹ *Arizona v. Navajo Nation*, 143 S. Ct. at 1819 (Thomas, J., concurring); *cf.* *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 2 (1831); *United States v. Kagama*, 118 U.S. 375, 383 (1886); *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).

¹¹² *Arizona v. Navajo Nation*, 143 S. Ct. at 1819 (Thomas, J., concurring) (citing *Seminole Nation*, 316 U.S. at 293–94; *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974); Bd. of Cnty. Comm’rs v. Seber, 318 U.S. 705, 707 (1943)).

¹¹³ *Rudisill*, 144 S. Ct. at 967 (Thomas, J., dissenting) (citing *Arizona v. Navajo Nation*, 143 S. Ct. at 1816 (Thomas, J., concurring)).

¹¹⁴ See *Bufkin v. Collins*, 145 S. Ct. 728, 733–42 (2025); *cf. id.* at 747–48 (Jackson, J., dissenting) (citing, *inter alia*, *Brown v. Gardner*, 513 U.S. 115, 118 (1994)).

of Appeals for Veterans Claims to implement a lower standard of review when reviewing “the VA’s application of the benefit-of-the-doubt rule.”¹¹⁵ Justice Thomas, writing for the Court, found that “the text leaves no doubt” as to the meaning of the statute and did not cite to *Gardner*.¹¹⁶ Justice Jackson, joined by Justice Gorsuch, dissented.¹¹⁷ She disagreed with the majority’s interpretation and found that “[t]he veterans canon resolves whatever lingering doubt might remain about the proper interpretation” of the statute, citing *Gardner* for the proposition that “interpretive doubt is to be resolved in the veteran’s favor.”¹¹⁸

These recent cases show that *Gardner* — though applied only in the narrow veterans law context — may be a harbinger of challenges to other federal benefits systems and longstanding substantive canons like the Indian trust doctrine.

III. CONGRESS CAN AND SHOULD CODIFY *GARDNER*

Given the Supreme Court’s disinclination to apply *Gardner*, in contravention of Congress’s intent, Congress can and should codify the pro-veteran presumption.

A. Congress’s Authority to Codify *Gardner*

Much ink has been spilled on the topic of whether Congress may constitutionally codify a substantive canon of interpretation via federal statute.¹¹⁹ The consensus among scholars is that codification would be permissible under the overarching principle that Congress drafts laws and sometimes tells federal courts how to interpret those laws.¹²⁰ This section first argues that codifying a canon in favor of the veteran falls within Congress’s authority — as “necessary and proper” to execute the legislative power broadly and the powers to “raise and support Armies” and “provide and maintain a Navy.”¹²¹ Next, it explains why such a

¹¹⁵ *Id.* at 738 (majority opinion).

¹¹⁶ *Id.* at 742.

¹¹⁷ *Id.* (Jackson, J., dissenting).

¹¹⁸ *Id.* at 747 (citing *Gardner*, 513 U.S. at 118).

¹¹⁹ For a more in-depth discussion, see Maisie A. Wilson, Note, *The Law of Lenity: Enacting a Codified Federal Rule of Lenity*, 70 DUKE L.J. 1663, 1684–88 (2021) (discussing the arguments for and against the codification of substantive canons of interpretation in the context of the rule of lenity), and Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088 (2002) (arguing that Congress may codify certain canons of interpretation).

¹²⁰ See Wilson, *supra* note 119, at 1687. This Note does not address any Article II implications of codification, as the codification prescription is not directed at the executive branch. The VA (an executive agency) is already under a directive to implement veteran-friendly interpretations, which it ignores. See 38 U.S.C. § 5107(b), commonly known as the benefit-of-the-doubt rule, in which Congress instructs the Executive — not the courts — to internally benefit veteran claimants. Given the ineffectiveness of internal Article II interventions like the “benefit-of-the-doubt” rule, this Note instead speaks to the legislative and judicial branches, asking them to hold the VA accountable.

¹²¹ U.S. CONST. art. I, § 8, cls. 12–13, 18.

codification neither infringes on Article III nor impermissibly delegates Congress's spending authority.

The Necessary and Proper Clause vests in Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”¹²² Scholars have read this provision to permit the codification of tools of statutory interpretation as “necessary and proper” to effectuate the legislative power.¹²³ Interpretive statutes like the Dictionary Act¹²⁴ have been utilized by the Court in this vein.¹²⁵ The first Dictionary Act was passed in 1871 with the purpose “to avoid prolixity and tautology in drawing statutes and to prevent doubt and embarrassment in their construction.”¹²⁶ Congress continues to update the Dictionary Act from time to time.¹²⁷ While the constitutional basis for the Dictionary Act has never been directly challenged, the most natural constitutional hook for Congress's authority to pass the statute is the Necessary and Proper Clause. The Court's repeated utilization of the Act accords with the constitutional principle that “[c]reating law is inherently in the power of the legislature, not the judiciary.”¹²⁸ However, despite the Court's previous reliance on the Dictionary Act as determinative in cases involving statutory interpretation, the Court has in the last decade resisted invocations of the Act.¹²⁹ The Court's change in treatment of the Dictionary Act could be seen as tracking with a perceived surge of judicial supremacy.¹³⁰ And a reassertion of Congress's role in statutory interpretation via codification of *Gardner* would represent a clear response to that trend.¹³¹

The codification of *Gardner* is also necessary and proper to execute Congress's authority to “raise and support Armies” and “provide and

¹²² U.S. CONST. art. I, § 8, cl. 18.

¹²³ Rosenkranz, *supra* note 119, at 2102 (citing Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1567–70, 1582–90 (2000)).

¹²⁴ 1 U.S.C. § 1–8.

¹²⁵ The Court's most recent utilization of the Dictionary Act as determinative was in 2019, when the Court found the word “person” to not include a federal agency. *Return Mail, Inc. v. USPS*, 139 S. Ct. 1853, 1857 (2019). In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), the Court relied in part upon the Act to determine that corporations are “people.” *Id.* at 707–08.

¹²⁶ Emily J. Barnett, *Hobby Lobby and the Dictionary Act*, 124 YALE L.J.F. 11, 12 (2014) (quoting CONG. GLOBE, 41st Cong., 3d Sess. 1474 (1871) (statement of Rep. Poland)).

¹²⁷ See 1 U.S.C. § 1. The Dictionary Act was updated in 1959, 1996, 2002, and most recently in 2012. *Id.*; 21st Century Language Act of 2012, Pub. L. No. 112–231, 126 Stat. 1619.

¹²⁸ Wilson, *supra* note 119, at 1687.

¹²⁹ In *Moyle v. United States*, 144 S. Ct. 2015 (2024), the dissent cited the Dictionary Act in objecting to the majority's interpretation of the Emergency Medical Treatment and Active Labor Act (EMTALA). *Id.* at 2029 (Alito, J., dissenting). In *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021), the Court rejected arguments under the Dictionary Act in an immigration setting. *Id.* at 1482.

¹³⁰ See Nikolas Bowie & Daphna Renan, Opinion, *The Supreme Court Has Grown Too Powerful. Congress Must Intervene.*, N.Y. TIMES (Oct. 11, 2024), <https://www.nytimes.com/2024/10/11/opinion/laws-congress-constitution-supreme-court.html> [<https://perma.cc/UYJ8-ER5J>].

¹³¹ See *infra* section III.B.1, pp. 2109–11.

maintain a Navy.”¹³² While veterans’ benefits may be viewed as separate from the active duty military, the two are inextricably linked.¹³³ And the Court has consistently deferred to Congress on matters of national security. It has stated that the military context is when “judicial deference . . . is at its apogee,”¹³⁴ and that “[i]t is difficult to conceive of an area of governmental activity in which the courts have less competence.”¹³⁵ If confronted with a statute codifying *Gardner*, courts should defer to the congressional determination that veterans’ benefits play an integral role in manning the active duty armed forces. In the current all-volunteer military, recruiting desired numbers of qualified and willing enlistees has proven difficult, and the joint services missed recruiting goals by 41,000 enlistees in fiscal year 2023 alone.¹³⁶ A top reason that new recruits list for joining the military is to access benefits, with many servicemembers specifically referencing the GI Bill benefits administered not through the Department of Defense, but through the VA.¹³⁷ Creating policy that affects the recruitment of future soldiers, sailors, marines, and airmen is thus necessary and proper to achieve Congress’s authority over the army and navy.¹³⁸

The historical record confirms that Congress has long considered veterans’ care as necessary for military recruitment. The first-ever pension law of 1776 was passed “to encourage enlistment in the Revolutionary army.”¹³⁹ George Washington supported veteran pensions to prevent soldiers from deserting when pay, supplies, and morale were short.¹⁴⁰ This promise from Congress of post-service benefits was considered critical to preserving the army in the midst of a “dire emergency”

¹³² U.S. CONST. art. I, § 8, cls. 12–13.

¹³³ A quote attributed to George Washington captures this sentiment: “The willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional as to how they perceive the veterans of earlier wars were treated and appreciated by their nation.” See Yuval Levin, *Misquoting Washington*, NAT’L REV. (Feb. 4, 2008, 4:37 PM), <https://www.nationalreview.com/corner/misquoting-washington-yuval-levin> [https://perma.cc/Z2VN-5NQN].

¹³⁴ *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981).

¹³⁵ *Id.* at 65 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)); *accord id.* at 64–65 (“The case arises in the context of Congress’ authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.”).

¹³⁶ David Vergun, *DOD Addresses Recruiting Shortfall Challenges*, U.S. DEP’T OF DEF. (Dec. 13, 2023), <https://www.defense.gov/News/News-Stories/Article/article/3616786/dod-addresses-recruiting-shortfall-challenges> [https://perma.cc/VY5C-D5ZD].

¹³⁷ TODD C. HELMUS ET AL., RAND CORP., *LIFE AS A PRIVATE: A STUDY OF THE MOTIVATIONS AND EXPERIENCES OF JUNIOR ENLISTED PERSONNEL IN THE U.S. ARMY* 28 (2018).

¹³⁸ See *Johnson v. Robinson*, 415 U.S. 361, 363, 376 (1973) (explaining that the authority to provide educational benefits through the Veterans’ Readjustment Benefits Act of 1966, Pub. L. No. 89-358, 80 Stat. 12 (codified as amended in scattered sections of 38 U.S.C.), the stated purpose of which was to “enhance[e] and mak[e] more attractive service in the Armed Forces of the United States,” was “plainly within Congress’ Art. I, § 8, power ‘to raise and support Armies,’” *Johnson*, 415 U.S. at 376 (quoting 38 U.S.C. § 1651)).

¹³⁹ GLASSON, *supra* note 62, at 15.

¹⁴⁰ *Id.*

that may have threatened the United States's ability to achieve independence itself.¹⁴¹ Congress again legislated veterans' benefits to address manning needs following the deeply unpopular Vietnam War. With the end of the draft, "results were immediate: between February and March 1971, the number of volunteers dropped by 65 percent."¹⁴² The Post-Vietnam Era Veterans' Educational Assistance Program, formed through an Act passed in 1976,¹⁴³ was "designed as a recruitment incentive for the Armed Forces during peacetime."¹⁴⁴ History shows America's promises to its veterans are not only altruistic expressions of thanks for the sacrifices that its service members make for the nation, but also critical components of military manning and recruitment strategy.

Article III of the Constitution, granting the judiciary the power to "say what the law is,"¹⁴⁵ is the most relevant limiting factor applicable to this prospective codification. For example, statutes that purport to prescribe "Rules of Decision" to the judiciary would be infringements on the judicial power.¹⁴⁶ The Court has stated that a law as simple as "in 'Smith v. Jones,' 'Smith wins,'" would impermissibly "direct the court how preexisting law applies to particular circumstances."¹⁴⁷

However, other statutory schemes that could be read as "infringements" on the judicial power instead have been sanctioned by the Court.¹⁴⁸ It is not clear whether the Court presently has the appetite to strengthen or clarify this line, given its recent repeated abstention from issuing opinions on the Article III constitutionality of legislation.¹⁴⁹ The Court may be similarly reluctant to issue a separation of powers ruling in response to Congress's codifying a narrow substantive canon like *Gardner*. Article III rules of decision jurisprudence thus does not pose a major obstacle to codification.

¹⁴¹ *Id.* at 17.

¹⁴² Brian McAllister Linn, *A Historical Perspective on Today's Recruiting Crisis*, PARAMETERS, Autumn Demi-Issue 2023, at 5, 12.

¹⁴³ Veterans' Education and Employment Assistance Act of 1976, Pub. L. No. 94-502, tit. IV, 90 Stat. 2392 (codified as amended in scattered sections of 38 U.S.C.).

¹⁴⁴ DAVID P. SMOLE & SHANNON S. LOANE, CONG. RSCH. SERV., RL34549, A BRIEF HISTORY OF VETERANS' EDUCATION BENEFITS AND THEIR VALUE 4 (2008).

¹⁴⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁴⁶ In *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), the Court ruled as unconstitutional Congress's attempt to constrain the President's Article II pardon power. *Id.* at 147-48. However, language in the case suggests that a broad reading would equally proscribe the statute as an infringement on the judiciary's Article III power. See Gordon G. Young, *United States v. Klein, Then and Now*, 44 LOY. U. CHI. L.J. 265, 265 (2012).

¹⁴⁷ *Bank Markazi v. Peterson*, 578 U.S. 212, 225 n.17 (2016) (quoting Transcript of Oral Argument at 40, *Bank Markazi*, 578 U.S. 212 (No. 14-770), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/14-770_m640.pdf [<https://perma.cc/R4X7-VXW6>]).

¹⁴⁸ See, e.g., *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 433, 441 (1992) (deeming a law passed by Congress aimed at resolving ongoing litigation constitutional); *Bank Markazi*, 578 U.S. at 215 (deeming a law passed by Congress, involving foreign affairs and litigation, constitutional).

¹⁴⁹ See, e.g., *Mountain Valley Pipeline, LLC v. Wilderness Soc'y*, 144 S. Ct. 42 (2023) (mem.) (declining to consider whether legislation infringed on Article III).

Neither does the Spending Clause. Justice Kavanaugh speculated in his *Rudisill* concurrence that *Gardner*'s presumption may run afoul of the constitutional separation of powers for reasons that would also apply to codification.¹⁵⁰ He argued that any delegation of spending power to courts may violate the Spending Clause, which vests the authority to "provide for the common Defence and general Welfare of the United States" in the legislature.¹⁵¹ He argued that the canon putting "a thumb on the scale in favor of" veterans is similar to Congress making a spending decision.¹⁵² Who receives government benefits is a "zero-sum game," he argued, because any spending decisions necessitate "painful trade-offs" vested solely in the legislature, not courts.¹⁵³

Justice Kavanaugh's argument ignores both the text of veterans' benefits statutes that clarify congressional intent and the budgetary impact of *Gardner*'s presumption. First, *Gardner* represents the premise that courts should read veterans law liberally because Congress passed these statutes with the intent to help veterans.¹⁵⁴ Courts are not overstepping their "proper constitutional role in the federal spending process" when they effectuate Congress's intent for money to be spent¹⁵⁵ — especially if Congress makes that intent even clearer by codifying *Gardner*. Second, the idea of *Gardner* forcing courts to engage in a "tradeoff"¹⁵⁶ in federal benefits misunderstands the way that Congress funds veterans' benefits. By the time Congress passes the annual appropriations act, which funds the VA, it has already made the "hard choices with painful tradeoffs."¹⁵⁷ When courts order the VA to expend money in the form of benefits, that money is not withdrawn from the accounts of other federal beneficiaries. Rather, it comes from the funds that Congress has already appropriated for specific programs.¹⁵⁸ If presented with a budget shortfall, the VA typically asks Congress for additional funds, which Congress may or may not provide.¹⁵⁹ A court's

¹⁵⁰ See *Rudisill v. McDonough*, 144 S. Ct. 945, 960–61 (2024) (Kavanaugh, J., concurring).

¹⁵¹ U.S. CONST. art. I, § 8, cl. 1.

¹⁵² *Rudisill*, 144 S. Ct. at 961 (Kavanaugh, J., concurring).

¹⁵³ *Id.* at 960.

¹⁵⁴ See *supra* section II.B, pp. 2098–100.

¹⁵⁵ *Rudisill*, 144 S. Ct. at 961 (Kavanaugh, J., concurring).

¹⁵⁶ *Id.* at 960.

¹⁵⁷ *Id.*; see also 2 U.S. DEP'T OF VETERANS AFFS., CH. 2, VA'S BUDGET CYCLE AND FUND SYMBOLS (2024), <https://department.va.gov/financial-policy-documents/financial-document/chapter-02-vas-budget-cycle-and-fund-symbols> [<https://perma.cc/3XSC-8N64>] (describing the appropriations process followed by the Department).

¹⁵⁸ U.S. DEP'T OF VETERANS AFFS., *supra* note 157 ("An appropriation represents legal authority, granted by Congress and signed into law by the President, for VA to incur obligations and make disbursements of funds in accordance with the appropriation act.")

¹⁵⁹ See Rebecca Kheel, *A Nearly \$3 Billion Shortfall in VA Benefits Is Looming. The Senate Has Proposed a Fix, But Time Is Running Out.*, MILITARY.COM (July 30, 2024, 3:50 PM), <https://www.military.com/daily-news/2024/07/30/nearly-3-billion-shortfall-va-benefits-looming-senate-has-proposed-fix-time-running-out.html> [<https://perma.cc/QLS7-MTCM>].

decision to apply *Gardner*, and compel the VA to spend money it already has, does not resemble a typical congressional spending decision.

Codifying *Gardner* would address Justice Kavanaugh's misplaced Spending Clause concerns and ratify both Congress's historically beneficent intent underlying veterans' benefits statutes, as well as its determination that the benefits to veterans outweigh the costs to the treasury.

Given the constitutional hooks of the Necessary and Proper Clause and Congress's military powers, the Court's permissive attitude toward Article III rules of decision cases in recent years, and the lack of Spending Clause delegation concerns, it is likely that codification of a substantive canon of interpretation like *Gardner* would be constitutionally permissible.

B. Congress Should Codify Gardner

Having established that Congress can codify *Gardner*, this Note argues that Congress should codify *Gardner*. While theoretical "what-ifs" are ripe fodder for law reviews, the best way to resolve the overarching question about the separation of powers is for Congress to act. *Gardner* presents an ideal test case for codification as the most politically feasible substantive canon.

1. *Congress as an Institution.* — Codifying *Gardner* is a good opportunity for Congress to accept the judiciary's invitation to play a bigger role in statutory interpretation. In *Loper Bright Enterprises v. Raimondo*,¹⁶⁰ the Supreme Court overturned the *Chevron* doctrine, ending an era of deference to agency interpretations of ambiguous statutes.¹⁶¹ In *Loper Bright*, the Court ostensibly wrested power from the executive branch and returned it to the legislative branch, while deeming itself the proper institution to have the final say on statutory meaning.¹⁶² *Gardner* presents the ideal opportunity for Congress to guide judicial interpretation, as instructed by the Court in *Loper Bright*,¹⁶³ and provide a check against what some have perceived to be undue judicial supremacy.¹⁶⁴ Other canons that could be considered for codification — like the rule of lenity,¹⁶⁵ establishing a presumption in favor of criminal defendants — would require far more political capital given that criminal defendants do not enjoy the same stable, bipartisan

¹⁶⁰ 144 S. Ct. 2244 (2024).

¹⁶¹ See *id.* at 2263 ("The deference that *Chevron* requires of courts reviewing agency action cannot be squared with the [Administrative Procedure Act].").

¹⁶² *Id.*; see also *id.* at 2286 (Gorsuch, J., concurring) (stating that a substantive canon of interpretation, the rule of lenity, "fortifies the separation of powers by keeping the power of punishment firmly 'in the legislative, not in the judicial department'" (quoting *Wooden v. United States*, 142 S. Ct. 1063, 1083 (2022) (Gorsuch, J., concurring in the judgment)).

¹⁶³ *Id.* at 2267 (majority opinion).

¹⁶⁴ See Bowie & Renan, *supra* note 130.

¹⁶⁵ See *Loper Bright*, 144 S. Ct. at 2286 (Gorsuch, J., concurring); Wilson, *supra* note 119, at 1663.

support that veterans do.¹⁶⁶ Put differently, *Gardner*'s pro-veteran political messaging would require a comparatively small outlay of political capital to remind the Court of Congress's status as a coequal branch.

In addition to making a statement about its relationship with the Court, Congress through codification could demonstrate bipartisan support for veterans, which would be politically beneficial to the body as a whole. Codifying *Gardner* would allow Congress to present to the American public evidence of both bipartisan cooperation and support for veterans, the latter of which remains high among the general public.¹⁶⁷ A recent example of this winning formula can be seen in the passage and subsequent success of the Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics (PACT) Act of 2022.¹⁶⁸ The PACT Act passed with an 86–11 majority in the Senate and 342–88 majority in the House.¹⁶⁹ Polling showed overwhelming public support for the Act,¹⁷⁰ which has gone on to help over one million veterans receive presumptive eligibility for VA services for exposure to toxic chemicals in the course of duty.¹⁷¹

Congress consists of a notably higher percentage of veterans compared to the Federal Circuit and Supreme Court combined.¹⁷²

¹⁶⁶ See Megan Brennan, *Americans More Critical of U.S. Criminal Justice System*, GALLUP (Nov. 16, 2023), <https://news.gallup.com/poll/544439/americans-critical-criminal-justice-system.aspx> [<https://perma.cc/YL99-HCRL>] (“58% say criminal justice system is not tough enough, up 17 points since 2020.”).

¹⁶⁷ See MEREDITH KLEYKAMP ET AL., RAND CORP., WHAT AMERICANS THINK ABOUT VETERANS AND MILITARY SERVICE: FINDINGS FROM A NATIONALLY REPRESENTATIVE SURVEY, at v (2023) (“Public perceptions of veterans are overwhelmingly positive. Approximately 30–80 percent of survey respondents endorsed positive stereotypes, and only 3–20 percent endorsed negative stereotypes of veterans.”).

¹⁶⁸ Pub. L. No. 117-168, 136 Stat. 1759 (codified in scattered sections of 38 U.S.C.).

¹⁶⁹ Patricia Kime & Drew F. Lawrence, *After 3 Tries, Veterans Toxic Exposure Bill — The PACT Act — Finally Passes US Senate*, MILITARY.COM (Aug. 2, 2022), <https://www.military.com/daily-news/2022/08/02/after-3-tries-veterans-toxic-exposure-bill-pact-act-finally-passes-us-senate.html> [<https://perma.cc/N6SW-S9FL>].

¹⁷⁰ Ellie DeCleene, *Voters Strongly Support the Bipartisan Honoring Our PACT Act*, DATA FOR PROGRESS (July 12, 2022), <https://www.dataforprogress.org/blog/2022/7/12/voters-strongly-support-the-bipartisan-honoring-our-pact-act> [<https://perma.cc/3JX7-4MEB>] (“New Data for Progress polling finds that 93 percent of voters believe that it is ‘very’ or ‘somewhat important’ for the U.S. government to provide healthcare to veterans who were exposed to toxins while serving overseas. This includes 93 percent of both Democrats and Republicans and 92 percent of Independents, demonstrating remarkable bipartisan agreement.”).

¹⁷¹ Press Release, The White House, FACT SHEET: President Biden to Announce 1 Million PACT Act Claims Approved, Benefits Delivered to Veterans in All 50 States and U.S. Territories (May 21, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/21/fact-sheet-president-biden-to-announce-1-million-pact-act-claims-approved-benefits-delivered-to-veterans-in-all-50-states-and-u-s-territories> [<https://perma.cc/QX4F-B5DS>].

¹⁷² Compare JENNIFER E. MANNING, CONG. RSCH. SERV., R47470, MEMBERSHIP OF THE 118TH CONGRESS: A PROFILE 9 (2024) (finding that, as of December 2024, ninety-eight individuals or 18.1% of all members of Congress had served in the military), with *Justices with Military Service*, SUPREMECOURT.GOV (Nov. 3, 2023), <https://www.supremecourt.gov/didyouknow/images/>

Codifying *Gardner* would allow Congress to send powerful messages to both the Court and the public, to the benefit of Congress as an institution.

2. *Congress as Partisan Interests.* — Both parties should support codifying *Gardner*. Democrats should care about codification because veterans law is poverty law.¹⁷³ A 2024 point-in-time count found 32,882 veterans experiencing homelessness, accounting for about 5% of the total homeless population.¹⁷⁴ Veterans law has been at the forefront of federal assistance programs since the Founding¹⁷⁵ and should be recognized as a vehicle for legal innovation that can be extended to other programs that Democrats wish to expand.¹⁷⁶

Veterans are also a critical Republican constituency. Sixty-five percent of veterans supported President Donald Trump in the 2024 election¹⁷⁷ and “traditional values of the Republican party . . . value[] strong military defense systems including the care of Veterans.”¹⁷⁸ The Republican Party’s platform includes: “Take Care of Our Veterans.”¹⁷⁹ Codifying *Gardner* would allow the party to fulfill that promise during the current period of unified Republican government.

Codifying *Gardner* may also support specific veterans-related policy goals of the Trump administration. Seen as a policy wish list for the second Trump administration, Project 2025 emphasizes the importance of allowing veterans to access privatized care outside of the VA.¹⁸⁰ In

JusticesWithMilitaryService11-3-2023wAlitoImage.pdf [https://perma.cc/6859-ZK6Z], and *Judge Biographies*, U.S. CT. OF APPEALS FOR THE FED. CIR. (Apr. 23, 2025, 2:50 PM), https://www.ca9.uscourts.gov/home/the-court/judges/judge-biographies [https://perma.cc/J8BF-MXAE] (showing, in contrast, that only two active members or 7.1% of the two main Article III appellate courts that decide veterans benefits claims are veterans).

¹⁷³ Daniel Nagin, Clinical Professor of L. & Fac. Dir. of the WilmerHale Legal Servs. Ctr., Harvard L. Sch., Lecture at Harvard Law School: Veterans Law as Poverty Law (Oct. 31, 2023).

¹⁷⁴ TANYA DE SOUSA & MEGHAN HENRY, U.S. DEP’T OF HOUS. & URB. DEV., THE 2024 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS 49 (2024), https://www.huduser.gov/portal/sites/default/files/pdf/2024-AHAR-Part-1.pdf [https://perma.cc/8K9W-ZTCN].

¹⁷⁵ See *supra* section II.B, pp. 2098–100.

¹⁷⁶ These may include, for example, Social Security, Medicare and Medicaid, and SNAP. See DEMOCRATIC NAT’L CONVENTION, ’24 DEMOCRATIC PARTY PLATFORM 12, 18, 28 (2024), https://democrats.org/wp-content/uploads/2024/08/FINAL-MASTER-PLATFORM.pdf [https://perma.cc/9BC5-CQN3].

¹⁷⁷ Emily Guskin, Chris Alcantara & Janice Kai Chen, *Exit Polls from the 2024 Presidential Election*, WASH. POST (Dec. 2, 2024, 3:08 PM), https://www.washingtonpost.com/elections/interactive/2024/exit-polls-2024-election [https://perma.cc/PLX2-RWU9].

¹⁷⁸ Jack Tsai et al., *Is There More Public Support for US Veterans Who Experience Homelessness and Posttraumatic Stress Disorder than Other US Adults?*, 33 MIL. PSYCH. 15, 19 (2021).

¹⁷⁹ REPUBLICAN NAT’L CONVENTION 2024, THE 2024 REPUBLICAN PLATFORM: MAKE AMERICA GREAT AGAIN! 19 (2024), https://prod-static.gop.com/media/RNC2024-Platform.pdf [https://perma.cc/F5F8-TPCJ].

¹⁸⁰ Brooks D. Tucker, *Department of Veterans Affairs*, in PROJECT 2025, MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 641, 645–46, 649 (Paul Dans & Steven Groves eds., 2023), https://static.project2025.org/2025_MandateForLeadership_CHAPTER-20.pdf [https://perma.cc/9T8Y-VZN3].

future court battles where veterans may seek care outside of the federal civil service apparatus, a presumption in favor of the veteran may help overcome VA attempts to “avoid[] or water[] down” the rights of veterans to access private care.¹⁸¹ This outcome would fulfill the conservative goal of “drain[ing] the swamp” of federal civil service employees and decreasing the overall size of the federal government.¹⁸² Allowing access to the free market, rather than cumbersome bureaucratic processes and frustrating red tape, would especially benefit veterans living in areas without easy access to VA facilities.¹⁸³ *Gardner* may prove to be an indispensable tool in the fight to shrink the VA and give veterans more freedom in their healthcare choices.

CONCLUSION

Veterans law remains the “Wild West” of administrative law.¹⁸⁴ This Note urges Congress to venture further into this uncharted territory. Codifying *Gardner* would bolster Congress’s role as an institution. And most importantly, codification would benefit the veterans who have sacrificed on behalf of our great country.

¹⁸¹ *Id.* at 645.

¹⁸² Andrew Restuccia & Jess Bravin, *Why Trump’s Drastic Plan to Slash the Government Could Succeed*, WALL ST. J. (Oct. 30, 2023, 5:00 AM), <https://www.wsj.com/politics/elections/why-trumps-drastic-plan-to-slash-the-government-could-succeed-6828ccbe> [<https://perma.cc/EAU2-F59Q>].

¹⁸³ See Tucker, *supra* note 180, at 646.

¹⁸⁴ Simcox, *supra* note 14, at 573 (quoting *John Wayne Legacy: Quotes*, JOHN WAYNE ENTERS., <https://johnwayne.com/quotes> [<https://perma.cc/TX2S-PUKL>]).